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IN THE

# Supreme Court of the United States

OCTOBER TERM 1943

No. 284

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I. DAVID COHEN and HUEL'S CHEMISTS, INC.,
*Petitioners and Appellants below,*

against

UNITED STATES OF AMERICA,
*Respondent and Appellee below.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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SAUL M. MEADOW and BENJAMIN JAFFE,
*Counsel for Petitioners.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Honorable Supreme Court of the United States:*

The petition of I. David Cohen and Huel's Chemists, Inc. respectfully shows:

### 1

### Summary Statement of the Matter Involved

Petitioners were convicted by a jury after a trial in the United States District Court for the Southern District of New York upon an indictment (R. 10-33) charging them together with eighteen other defendants with conspiracy to violate the Internal Revenue Laws Sections 2,550(a), 2,551, 2,553, 2,554, 3,220, 3,221 and 3,224 of the Internal Revenue Code dealing with the manufacture, sale and general illegitimate use and traffic in narcotics.

Said petitioner I. David Cohen was sentenced to one year and a day and fined the sum of $1,000.00 (R. 846), and the petitioner Huel's Chemists, Inc. fined the sum of $10,000.00.

The petitioners herein appealed to the United States Circuit Court of Appeals for the Second Circuit upon various grounds fully set forth in the Assignments of Errors (R. 862-871). Upon such appeal the Circuit Court of Appeals for the Second Circuit, by a divided opinion, affirmed the conviction of these petitioners I. David Cohen and Huel's Chemists, Inc., and wrote an opinion on same.

The grounds which will be relied on in this Court, if the petition is granted, are as follows:

A. The indictment charged a conspiracy consisting of a single count. The proof submitted embraced three different conspiracies, different in personnel as well as in content, therefore there was a misjoinder which was harmful sufficient to warrant a dismissal of the indictment.

B. The evidence failed to prove the petitioners guilty of the crime as charged.

C. There was a fatal harmful variance between the allegations of the indictment and the opening of the Assistant United States Attorney and the proof subsequently submitted.

D. The Judge's charge was inadequate, unenlightening and confusing which was not sufficient to allow the jury to arrive at a result in conformity with the proof adduced at the trial and the law involved in the case.

E. The trial was unfair, depriving the petitioners of their rights guaranteed by the United States Constitution.

At the end of the Government's case and at the end of the defendants' case the petitioners herein moved to dis-

miss the indictment. It should be noted here that the Trial Judge, to conserve time, gave every defendant the benefit of every motion made by any of the other defendants (R. 28, 29, 340, 600-610, 611, 757, 767, 770).

The Government in its opening stated that three different conspiracies existed for which the defendants were on trial, the first conspiracy being to manufacture morphine synthetically, the second conspiracy being to extract narcotics for illegitimate use from tax-exempt narcotic preparations. It was conceded by the Government that the petitioners were not concerned with the first two conspiracies, although the majority of the trial was concerned solely with the aforementioned two conspiracies. The third conspiracy contended by the Government was the diversion of opium or extraction of same from exempt narcotic preparations. It was the contention of the Government that the petitioners herein were a part of this conspiracy in the following manner: Sales of lead and opium wash which is a narcotic of limited content and an exempt preparation was sold by the manufacturer (defendants Charles Londoner, Murray Palmer and Leading Drug Company) to jobbers as selling agents (defendant Fox), to retail druggists, petitioners Huel's Chemists, Inc. and I. David Cohen, who sold to individual defendant Liss. The Government's contention was that the jury inferred from these facts that defendant Liss returned the lead and opium wash to the manufacturer (the defendants Charles Londoner, Murray Palmer and Leading Drug Company). The Government further contended that in furtherance of said conspiracy the petitioner Huel's Chemists, Inc. failed to keep proper records pursuant to the regulations of the Department of Treasury of the United States in dealing with exempt narcotic preparations, and that the said exempt narcotic preparation, to wit, lead and opium wash, was not used for medicinal purposes as required under the statute.

It was conceded by the Government that the first two conspiracies failed.

The majority of the Circuit Court of Appeals affirmed the judgment of conviction of the District Court on an entirely new theory, to wit, the failure of petitioners herein to keep proper records and the selling of the exempt narcotic preparation for non-medicinal purposes.

## 2

## Jurisdiction to Review

The United States Circuit Court of Appeals for the Second Circuit made its order for a mandate herein affirming the conviction of the petitioners I. David Cohen and Huel's Chemists, Inc. on August 3, 1943 (R. 933). The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. Code, Section 347, subdivisions a and c, and as amended by Section 240(a) under the Act of February 13, 1925, and Rule 38 of the Revised Rules (1939) of the Supreme Court of the United States. The reasons directly hereinafter further set forth constitute valid grounds for invoking the jurisdiction of this Court.

## 3

## Questions Presented

A. Was it proper to combine in one indictment three different alleged conspiracies which were different as to personnel and one of which, if proved, would constitute no crime? The three conspiracies which the Government contended were criminal are as follows:

1. To manufacture morphine synthetically.

2. To extract narcotics for illegitimate use from tax-exempt narcotic preparation such as paragoric, lead and opium wash and Stoke's Expectorant.

3. To divert opium by means of a circulation through the various defendants of lead and opium wash so that the manufacturer could continuously use the same lead and opium wash without manufacturing same and secure the opium from the Government by falsifying its records and divert the said opium to the illegal market.

The petitioners I. David Cohen and Huel's Chemists, Inc. had no connection with conspiracies "a" and "b" (see Opinion of Circuit Court of Appeals, R. 898-919). Conspiracy "a", if successful, would not constitute a crime (see Opinion of Circuit Court of Appeals, R. 898-918). Conspiracy "c" failed utterly of proof (see Opinion of Circuit Court of Appeals, R. 898-918). The necessary vital link, to wit, to show the sales of the lead and opium wash by the defendant Liss to the defendants Charles Londoner, Murray Palmer and a leading drug company was missing.

B. Was there not a harmful and fatal variance between the allegations in the indictment and the proof as presented because of the foregoing and the following reasons:

1. The jury confused the issues as to the petitioners I. David Cohen and Huel's Chemists, Inc.

2. The jury indiscriminately and cumulatively used evidence against the petitioners, which evidence related solely to the first two conspiracies above mentioned, to which the petitioners were not parties. One of the conspiracies did not constitute a crime; therefore, it was misleading to the jury to hear a vast amount of testimony in reference to a legal transaction which appeared illegal.

C. Was the Judge's charge enlightening and direct, sufficient to aid the jury in intelligently weighing the guilt or innocence of the petitioners? Was the presentation by the Assistant United States Attorney in his opening and during the course of the trial and his summation sufficiently

clear so as to enable the jury to properly know the issues of the case?

D. Were not the petitioners herein deprived of a fair and impartial trial as required by the Sixth Amendment of the Constitution of the United States?

E. Was not the purchase by defendant Liss from petitioners I. David Cohen and Huel's Chemists, Inc. a legal transaction on the part of Liss, therefore making a conspiracy between the two impossible, inasmuch as one of the parties was engaged in a legal act?

## 4

### Reasons Relied on for Allowance of the Writ

The decision of the Circuit Court of Appeals is in direct conflict with the established law applicable to the facts in this case.

The principles of law in so far as they apply to the case at bar are as follows:

A. It is improper to combine into one single count indictment an offer to prove three different conspiracies, one of which was a legal agreement, and two of which the Government conceded they failed to prove, wherein the personnel were separate and different.

B. Such a combination and joinder was harmful and fatal, and particularly so when the opening and closing statements of the Assistant United States Attorney were unenlightening and the Judge's charge to the jury was indirect, inadequate and unenlightening and unintelligent.

C. The petitioners were not afforded a fair and impartial trial, as required by the Sixth Amendment of the Constitution of the United States, inasmuch as the Trial Judge showed bias, the Trial Judge conducted extensive cross-examination and direct examination of all witnesses, he personally belittled all of the defendants and their counsel and directed petitioners' counsel to refrain from participating in the trial other than when the petitioners' names were mentioned.

D. Where there is a sale of a commodity which is legal for the buyer to purchase, the seller cannot be guilty of a conspiracy although he may be guilty of a substantive crime.

WHEREFORE, your petitioners pray that a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, directing said Court to certify and send to this Court a full and complete transcript of the records and proceedings of the said Circuit Court had in the case numbered and entitled on its docket No. 1863, Calendar No. 223, United States of America, Appellee, against Jack Liss, et al., Appellants, to the end that the case may be reviewed and determined by this Court as provided for by the Statute of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as to this Court may seem just and proper.

Dated, August 20, 1943.

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